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In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTHONY R. LA DUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MARSHALL T. GOLDING,
Attorney,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The court of appeals affirmed petitioner's conviction without opinion. The judgment order of the court of appeals (Pet. App. 1a-3a) is reported at 546 F. 2d 416.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1976. The petition for a writ of certiorari was filed on December 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a prosecution under 18 U.S.C. 644 for embezzlement from a pension fund, evidence that the existence of the fund had been "communicated or its

benefits described in writing to the employees" is a jurisdictional prerequisite to conviction.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of embezzlement from a union pension fund, in violation of 18 U.S.C. 664. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-3a).

The indictment charged petitioner and a co-defendant, John Martin Neiman, with embezzling property "of the Paper Industry Union Management Pension Fund" in the amount of $100,000 (Tr. 5.72). The evidence showed that petitioner and Neiman procured a $100,000 check from the fund, purportedly to make an investment for the fund's benefit. They exchanged the check for a certificate of deposit made out to a dummy corporation that they owned. They used the certificate as collateral for two loans to their corporation; the proceeds of the loans were deposited in two of the corporation's accounts, and the accounts subsequently were depleted by checks drawn by petitioner and Neiman for their own use (Tr. 2.94-2.124, 2.163-2.177, 3.22-3.45).

The evidence also showed that the Paper Industry Union Management Pension Fund was established in 1963 for members of the United Paper Workers International Union; was governed by a written trust agreement, written by-laws, trustees, and an administrator; had assets of approximately $23 million, which were invested under the direction of a money manager; was funded by employer contributions; and covered 27,000 of the 400,000 members of the union (Tr. 1.50-1.54, 3.94-3.97, 3.134). The court instructed the jury, *inter alia*, that

in order to find petitioner guilty of the offense charged in the indictment it must find that "the fund was an employee pension benefit plan" (Tr. 5.73). The court did not expressly define the phrase "employee pension benefit plan" (see Tr. 5.73); however, petitioner did not challenge the adequacy of the instruction or of the government's proof of the nature of the fund until after the verdict (see Sentencing Tr. 5-11, 25).

ARGUMENT

The statute under which petitioner was charged, 18 U.S.C. 664, defined an "employee pension benefit plan" as a plan "subject to the provisions of the Welfare and Pension Plans Disclosure Act."[1] The definitions section of the latter statute provides, *inter alia*, that "[t]he term 'employee pension benefit plan' means any plan, fund, or program which is communicated or its benefits described in writing to the employees * * * " (29 U.S.C. 302(a)(2)). Petitioner contends that evidence that the benefits of the particular plan have been communicated or described in writing to the plans' beneficiaries is a jurisdictional prerequisite to conviction under 18 U.S.C. 664, that the evidence at trial failed to establish this element of the offense, and that the court's instructions were plainly erroneous in that respect.

There is, of course, no question that the government is obligated to prove beyond a reasonable doubt every essential element of the offense charged (*e.g., In re Winship*, 397 U.S. 358, 364), but we do not agree with petitioner that

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[1] 18 U.S.C. 664 was amended in 1974 by Section 111(a)(2)(A) of Pub. L. 93-406, 88 Stat. 851. The amended statute covers "any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974."

the evidence at trial or the court's instructions failed to satisfy this requirement. At the time of the offenses charged in the indictment, all funds covered by the Welfare and Pension Plans Disclosure Act, 72 Stat. 997, as amended, 29 U.S.C. 301 *et seq.* ("Disclosure Act"), were protected from unauthorized conversion by 18 U.S.C. 664. The Disclosure Act applies to "*any* employee welfare or pension benefit plan" having the requisite interstate nexus, unless specifically excluded (29 U.S.C. 303(a); emphasis added). Employee welfare or pension benefit plans are exempt from the Disclosure Act if they are (1) administered by a governmental entity or instrumentality, (2) established or maintained solely for the purpose of complying with applicable workmen's compensation or disability insurance laws, (3) administered by and in conjunction with membership in certain tax exempt organizations, or (4) cover 25 or fewer persons. 29 U.S.C. 303(b).

Petitioner has never suggested that the Paper Industry Union Management Pension Fund, which benefits approximately 27,000 persons, falls within one of the four categories of welfare or pension arrangements specifically excluded from the Disclosure Act.[2] Rather, he focuses on the language used by Congress to describe "any employee welfare or pension plan," except those specifically excluded, and contends that at least one of the characteristics referred to in that definition—that is, that the plan be "communicated or its benefits described in writing to the employees" (29 U.S.C. 302(a)(2))—constitutes an essential element of the offense prescribed by 18 U.S.C. 664.

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[2]Petitioner's defense at trial was that Neiman, who already had pleaded guilty to the charges in the indictment, had embezzled from the fund and that his own participation in the embezzlement was wholly innocent (see, *e.g.*, Pet. 5).

But the legislative history of the Disclosure Act confirms that Congress intended to regulate all pension plans not falling within one of the four categories of plans specifically enumerated in subsection (b) of Section 4 of the Act, 29 U.S.C. 303(b). The Senate report accompanying the bill (S. 2888) that ultimately became the Disclosure Act stated, for example, that the pension and welfare arrangements to be covered "include[d] all classes and all types of plans, large and small, * * * except workmen's compensation plans, plans administered by governmental instrumentalities, and plans of fraternal, religious, or eleemonsynary institutions" (S. Rep. No. 1440, 85th Cong., 2d Sess. 20 (1958)). By defining an "employee pension benefit plan" as "any * * * plan * * * which is communicated or its benefits described in writing to the employees * * * " (29 U.S.C. 302(a)(2)), Congress simply made clear that the Disclosure Act covered plans "which are formalized in some manner" rather than "informal or personal arrangements" such as "[i]ndividual arrangements with executives for benefits * * * " (S. Rep. No. 1440, 85th Cong., 2d Sess. 26 (1958)).

Congress thus did not intend the phrase "employee pension benefit plan" to have a technical meaning, different in some material respect from the commonly-understood meaning of that phrase. The court instructed the jury in the present case that it was required to find that the Paper Industry Union Management Pension Fund was an employee pension benefit plan (Tr. 5.73). The jury reasonably concluded, based upon the organization, size and history of the fund that the government had satisfied that element of the offense—and the evidence was plainly sufficient to support

that conclusion.[3] No more explicit and detailed instruction was required absent either a request by petitioner for such further instruction or some dispute concerning whether the plan was covered by the Disclosure Act.[4] See, *e.g.*, *United States* v. *Crockett*, 506 F. 2d 759, 762 (C.A. 5), certiorari denied, 423 U.S. 824 (use of statutory definition of "commercial gambling business" held to be unnecessary); *United States* v. *Cabbell*, 427 F. 2d 147, 148 (C.A. 4) (absence of a definition of the term "asportation" held not prejudicial).[5]

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[3]Petitioner has never contended that the Paper Industry Union Management Pension Fund is not an employee pension benefit plan—nor could he in light of the organization, size and history of the fund. In essence, petitioner's challenge to the sufficiency of the evidence amounts to no more than a challenge to the jury's drawing reasonable inferences from facts directly established at trial. It is settled, of course, that essential facts may be established at trial by direct or circumstantial evidence. Petitioner's challenge to the sufficiency of the evidence therefore must be rejected.

[4]For the same reasons, the court did not err in not including in its instructions the statutory definitions of the many other terms used in the Disclosure Act. For example, the term "employee," as used in the phrase "employee pension benefit plan," is defined in the Disclosure Act to mean "any individual employed by an employer" (29 U.S.C. 302(5)). "Employer" is defined in turn to mean "any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee welfare or pension benefit plan, and includes a group or association of employers acting for an employer in such capacity" (29 U.S.C. 302(4)). The omission from the court's instructions in this case of definitions of the terms "employer" and "employee" no more constituted a "jurisdictional" defect than did omission of a definition of the phrase "employee pension benefit plan."

[5]The decision in this case does not conflict with *United States* v. *Daley*, 545 F. 2d 505 (C.A. 1), relied upon by petitioner (Pet. 9). The defendant in *Daley* contended that the evidence was insufficient to establish that the fund at issue there was an employee pension benefit plan. The court rejected that contention, noting that the evidence in the record included "the original trust agreement, annual reports, and testimony on Fund practices * * *" (454 F. 2d at 510). Similarly, the record in the present case included evidence of the organization, size and history of the Paper Industry Union Management Pension Fund (see p. 2, *supra*), permitting the jury to conclude that the plan constituted an employee benefit pension plan.

Petitioner's reliance upon *Mullaney* v. *Wilbur*, 421 U.S. 684, and similar cases also is misplaced (Pet. 9). Unlike cases such as *Mullaney*, this case does not involve a shift in the burden of persuasion from the prosecution to the defense on an essential element of the crime charged. The court instructed the jury in the present case that the government was obligated to prove beyond a reasonable doubt that the Paper Industry Union Management Pension Fund was an employee benefit pension plan (Tr. 5.73).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MARSHALL T. GOLDING,
Attorney.

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